(The Arbitration Case)

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CHARLES ELMORE CROPLEY
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Supreme Court of the United States

October Term, 1930. No. 83.

PARAMOUNT FAMOUS LASKY CORPORATION, *et al.*,
Appellants,

against

UNITED STATES OF AMERICA,
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

APPELLANTS' REPLY BRIEF.

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IN THE

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APPELLANTS' REPLY BRIEF.

POINT I.

There is no lack of organization among the exhibitors.

The Government, at page 6 of its brief in this case (as well as at page 35 of its brief in the *Credit Case* [Docket No. 95]), stresses the point that the exhibitors "were so far unorganized that they could not be adequately represented by any existing organization or organizations." And see page 24 of the Government brief. It is submitted that this statement does not tell the whole story. In the first place, Mr. Hess, testifying (R., p. 208) [redacted], mentioned the following separate and distinct organizations of exhibitors:

Motion Picture Theatre Owners of the State of New York, Buffalo Zone;
Motion Picture Theatre Owners of the State of Michigan;
Motion Picture Theatre Owners of the State of Indiana;
Theatre Owners of the State of Texas;
Motion Picture Theatre Owners of the District of Columbia and Maryland;
Motion Picture Theatre Owners of New Jersey;
Motion Picture Theatre Owners of Kansas and Missouri;
Theatre Owners Chamber of Commerce of New York City;
Motion Picture Theatre Owners of the Northwest (including Minnesota, North and South Dakota);
Motion Picture Theatre Owners of America.

The 1928 Rules of Arbitration (R., p. 104), in providing that exhibitors' representatives on the board of arbitration "shall be appointed by the local exhibitors' association" implies that the existence of such associations in the different regions was the normal thing.*

The Record shows that there are local exhibitor organizations in the respective territories of those film board of trade secretaries, 21 in number, who were called as witnesses by the Appellants (Buffalo, p. 387; Butte, p. 437; Charlotte, pp. 400, 402; Chicago, p. 425; Cleveland [two organizations], p. 435; Dallas, p. 361; Detroit, p. 347; Indianapolis, p. 435; Kansas City, p. 434; Milwaukee, p. 403; Minneapolis, p. 390; Memphis-Little Rock, p.

* The Rules, however, are careful to provide for alternative means of designating exhibitors' representatives in the event that there should be no local exhibitors' association.

438; New York, p. 411; Oklahoma City, p. 437; Omaha, pp. 353, 354; Philadelphia, p. 329; St. Louis, p. 423; Salt Lake City, p. 431; San Francisco, p. 432; Seattle, p. 342; Washington, D. C. [three organizations], p. 375.).

Judge THACHER's opinion (R., p. 161), quoted at page 9 of the Government brief, concedes that "insofar as the exhibitors were organized, they were represented through representatives selected by their organizations"; but Judge THACHER, in saying (*ibid.*) that many of the individual theatres scattered throughout the United States were not represented in these negotiations, accords insufficient force to the finding of the Federal Trade Commission (R., p. 558) to the effect that: "Practically 100 per cent. of those engaged in the production, distribution and exhibition of motion pictures were represented at this conference." The plan for the conference was deemed fair by Mr. Myers, a Government witness (R., p. 450). And see our main brief, p. 35.*

POINT II.

The arbitration boards were fairly organized and acted fairly in reaching their decisions.

The Government stresses alleged interferences in the conduct of the Arbitration Boards (brief, pp. 18-20). But the illustrations of this alleged interference which the brief contains are unhappily chosen. Of the seven instances collected on the pages mentioned, five at once appear to be communications by Mr. Hess to film boards of trade or their Secretaries in his capacity as general attorney; a sixth (No. 5) was a notification by

* Observe also the circular notices sent by mail to each exhibitor in the United States (R., p. 237).

Mr. Hess to the Secretaries of the arbitration boards of the intention of Mr. Hess's clients to assert their rights under the Copyright Law (U. S. C. Tit. 17, § 25), which he correctly quoted; and the seventh (No. 6) was in response to a request from a board of arbitration, apparently unanimously made, for his advice as to the legal definition and effect of a trade custom. A reading of his answer to this request casts no reflection on his impartiality or his legal competence.

Generally speaking, it would seem to be the fact that these various instances of so-called interference were made for the purpose of calling to the attention of the film boards of trade the plain terms of either the Standard Contract or the Rules of Arbitration. Had the arbitrators chosen from each board attempted to follow or not to follow the plain terms of the Contract and Rules, the industry would have found itself confronted with the very condition of diversity which the exhibitors, in advocating standard contracts, made it their primary object to abolish.

The Government also contends (brief, pp. 20 and 43) that Mr. Hess exhorted a board of arbitration to make a peculiarly harsh award in a "bicycling" case. We have explained in our main brief (pp. 27, 28 and 46) that bicycling, or the unauthorized re-exhibition of pictures, was causing the distributors losses estimated by one witness at ten million dollars a year (R., p. 285). The practice also caused damage to the honest exhibitors (main brief, p. 28). Its eradication benefited both exhibitors and distributors alike. Bicycling, in fact, involves the same degree of moral turpitude as larceny or theft. In such cases, there is little basis for an appeal for clemency. Nevertheless, the record does show that

the usual rules adopted by the boards against the admission of parol evidence were, on at least one occasion, relaxed to allow an alleged bicycler to show an oral permit for the re-exhibition complained of (R., p. 442). Furthermore, in the very case cited by the Government as an instance of the harsh enforcement of the Rules, the long drawn out controversy, spread over pages 1524-1528 of the record, actually terminated in a letter from Mr. Hess leaving to the secretary of the Film Board (R., p. 1528) discretionary powers to settle the controversy "for any amount you believe should be accepted," and in a further recommendation that "in view of the circumstances involved in this case, service should not be interfered with because of this Award." *

It would be a vain thing to limit the recovery in bicycling cases to the rent lost, for exhibitors would then be induced to gamble against detection, being no worse off if caught than if they had duly contracted for the extra exhibitions. Fairness to the honest exhibitors no less than to the distributors requires some deterrent against the dishonest, who use bicycling as a means of keeping two or more houses going on the rental outlay required to run one. (Cf. R., pp. 285-286.) Moreover, bicycling may produce a violation of a "protection" clause, so that a distributor suffers as additional damages what he may be compelled to pay to the innocent exhibitor whose "protection" has been invaded.

It is difficult to reconcile with the terms of the Copyright Law (U. S. C. Tit. 17, § 25) the argument which the Government makes (brief, pp. 39, 41) on the measure of damages in bicycling cases. The Government's position is that whereas a court would have the power to

* See *infra*, p. 6n, for further reference to this case.

grant actual damages or a sum between $250 and $5,000, Mr. Hess's instructions limited the arbitrators to the more severe of two alternatives, the award of a sum measured by the statutory maximum and minimum figures. But the Government forgets that the statute in effect confers an option upon the injured party to the end that difficulties of proof may not frustrate recovery altogether. *S. E. Hendricks Co., Inc.* v. *Thomas Publishing Co.*, 242 Fed. 37, 41 (2nd Circ., 1917). Rentals are not an adequate measure of damages for the reasons pointed out above. Therefore, in advising distributors to demand the statutory figures, Mr. Hess was not taking away from the arbitrators any power or discretion which a court would have possessed in the premises; discretion only comes into play after the statutory alternative is invoked.

If our analysis is correct, in but one case cited in the Government brief (and that was the case of a second offender [R., p. 866; cf. Government brief, p. 43, *ad fin.*]), did the arbitrators award damages figured at a higher rate than $250 (the statutory minimum) for each unlicensed re-exhibition.*

The act of the Government (brief, p. 42) in characterizing the Appellants' course of conduct in this branch of the case as "penalizing a breach of contract" ignores the caveat of Congress that the employment of the statutory measure of damages "shall not be regarded as a penalty." U. S. C., Tit. 17, § 25(b). Even prior to the

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* An examination of record pages 1520-1521 will show that the award of $1,750 in a bicycling case of which the Government brief complains (pp. 20 and 43) embraced ten different unauthorized re-exhibitions by this particular exhibitor. The award to the distributor was $250 for each of five feature pictures bicycled and $100 for each of five news reels bicycled. Thus the damages in five out of the ten violations were at a rate *below the statutory minimum.* See in this connection Rule V of the 1928 Arbitration Rules (R., p. 113).

time when the statute became explicit, this Court had held that to employ the statutory figures was not to impose penalties. *Brady* v. *Daly*, 175 U. S. 148, 154-155 (1889). And see *Westermann Co.* v. *Dispatch Co.*, 249 U. S. 100, 108 (1919); Weil on Copyright (1917), § 1267.

The Government, in its discussion (brief, pp. 44-45) of the decisions of the Philadelphia Board of Arbitration, states that the majority of the Board's awards were in favor of distributors and against exhibitors, and then makes an inference of unfairness from this circumstance. It is submitted that when due allowance is made for the fact (see our main brief, pp. 27 and 47) that some exhibitors had a rather pronounced disposition toward wiliness and chicanery* (in 1928 alone there were 692 cases involving the giving of bad checks by exhibitors [R., p. 646], and that on the other hand, the distributors were large and responsible corporations, the numerical preponderance of awards in favor of distributors is neither surprising nor significant.

The suggestion in the Government brief (pp. 17 and 38) that the distributor representatives on a board of arbitration are united in interest overlooks the fact that the same distributor representatives are actively competing for the business of exhibitors in the territory in which they sit as arbitrators (R., p. 193), and their unity is no greater than that of the exhibitor representatives.

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* This disposition furnishes an answer to the criticism of the arbitration boards (Government brief, p. 44) for their refusal to "recognize verbal understandings between the parties." The fundamental *raison d'etre* for the parol evidence rule is illustrated by just such a situation as confronted the distributors in the case at bar. It will be recalled that in *Nichol* v. *Godts*, 10 Exch. 191 (1854) Chief Baron Pollock said (p. 194): "If A. and B. make a contract in writing, evidence is not admissible to shew that A. meant something different from what is stated in the contract itself, and that B. at the time assented to it. If that sort of evidence were admitted, every written document would be at the mercy of witnesses that might be called to swear anything."

The Government also challenges the unprejudiced character of the boards of arbitration on the ground that in one instance an exhibitor representative happened to be connected with one of the distributor organizations. But an examination of the case cited, the case of Mr. Brylawsky of the District of Columbia, shows that he retained his seat on the Board of Arbitration at the special insistence of the exhibitors (R., p. 385).

Generally speaking, the Rules go as far as possible in the direction of reducing hardship consequent upon the limited number of localities in which boards hold their sittings. The Government (brief, p. 36) admits that the Rules provide (R., p. 107) that the Board in its discretion may award a respondent exhibitor who has prevailed before the Board, railroad fare and an additional ten dollars; but the Government goes on to state baldly that this is "utterly inadequate"—a conclusion of its own, unsupported by any proof. It is submitted that this provision confers upon the exhibitor rights which he would not have before a court of law, and when we consider the relatively greater speed with which arbitration proceedings are completed when compared with proceedings in courts of law, and the relatively greater accuracy with which the time of hearing can be predicted (main brief, p. 62), the net result leaves a decided balance of advantage with the exhibitor.

In a special instance cited at page 36 of the Government brief, an exhibitor in Portland, Oregon, had to defend a claim in Seattle, Washington, although there was a film board of trade in Portland. The explanation of this is that the distributor with whom his contract was made had no exchange in Portland, and the contract was negotiated from Seattle (R., p. 345).

POINT III.

The measures taken for the enforcement of awards were not unreasonable.

It should be remembered in any discussion of the question of what pressure was applied upon the exhibitors to enforce arbitration awards, that the persons who felt the pressure were persons who had defaulted upon their obligations. We have already pointed out (*supra*, pp. 5-6) that even in a case involving ten re-exhibitions of films without authority, the distributors' General Attorney recommended clemency. That the measures to enforce awards were not harsh is further shown by the means available to an exhibitor to secure pictures notwithstanding the pendency of an award against him. The Government (brief, pp. 30-31) endeavors to show their inadequacy by stating that each particular means has a certain disadvantage connected with it. However, we submit that this loses sight of the fact that the alternative means exist in the conjunctive, and that there is small likelihood that at any one time will all of them prove unavailable.

In the region covered by the Philadelphia Film Board of Trade, there was at the end of the year 1928, but a single exhibitor against whom uncomplied with awards were outstanding for that year; and he was getting service from some distributors by putting up deposits of $150 with each of three distributors for feature pictures, and $75 with each of two distributors for short subjects, comedies and news reels (R., pp. 332-333). This theatre was later sold, and not long afterwards was closed on account of poor business (R., p. 333).

Incidentally, the point made at page 31 of the Government brief that distributors will not make new contracts with exhibitors in default unless security is put up, overlooks the fact that such an agreement on the part of the distributors was one of the so-called "supplemental agreements" which the testimony of no less than seventeen witnesses showed had been abandoned before the commencement of the trial. (See in this connection, our main brief, p. 82.)

The endeavor of the Government to point out a lack of reciprocity in the Rules in that a defaulting distributor is not treated in the same way as a defaulting exhibitor, is not persuasive because it loses sight of the fact that an exhibitor has the right to terminate all of his contracts with the distributor in default (R., p. 72), and that a distributor, while he remains in default, may not obtain redress from the board of arbitration against *any* exhibitor, and is also made to suffer a penalty of 10 per cent per month added to the award (R., p. 112).

See also page 14, *infra*.

POINT IV.

The record amply supports the appellants' contentions in regard to co-operation by the exhibitors in the arbitration plan.

It is submitted that the attempt of the Government (brief, pp. 45-46) to belittle the testimony as to the endorsement by the exhibitors of the 1928 Contract and Rules, is not entitled to serious consideration. The Government brief overlooks the finality of the approval given by the resolution of October 5, 1928 (R., pp. 615-616; main brief, p. 36). It also overlooks the extreme paucity of suits to set aside awards up to the time of the trial, although the number of awards made in 1927 was 6,442 and in 1928 7,304 (R., p. 645).* The greater portion of the testimony casting doubt upon the existence of co-operation will be found to relate to the early history of the standard contracts before the final approval of the 1928 Contract, and to be directed in many cases either against features of the earlier contracts which were eliminated in the 1928 Contract, or to specific practices such as supplemental agreements, which were abandoned prior to the trial.

When we recall that the agents of the Department of Justice "in the course of its investigation * * * conferred with and examined over 1100 persons, including

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* In 1928 12,201 claims were settled or withdrawn after being filed (R., p. 644). For the assistance afforded by the arbitration machinery in the matter of facilitating settlements or making adjustments through concessions, see Record, page 415. In 1928 in New York alone thousands of dollars of contracts were voluntarily scaled down by distributors to relieve exhibitors in distress (R., p. 421). The process is commonly called "allocation" (R., pp. 393, 420).

In New York 23 notices of suspension were sent out in 1928, involving about five or perhaps eight exhibitors (R., p. 417).

producers, distributors, exhibitors, and others interested in the motion picture business" (R., p. 193), the absence of direct testimony of hardship and oppression as a result of the Arbitration Plan * (as practiced under the 1928 Rules) is unquestionably of deep significance. *United States* v. *United States Steel Corp.*, 251 U. S. 417, 448 (1920).

POINT V.

The authorities cited by the Government are distinguishable.

In our brief in the *Credit Case* (pp. 33 and 34) we dealt with several of the cases cited in the Government brief in the instant case. It will suffice for our present purposes to point out that the principal additional authority now cited by the Government, *Wolff Packing Company* v. *Court of Industrial Relations*, 262 U. S. 522 (1923), cited at pages 24 and 32 of the Government brief and employed by the Court below (R., p. 169) as authority for the proposition that a "state legislature could not lawfully impose compulsory arbitration upon the motion picture industry", went off on propositions of law having, we submit, no relevance to the case at bar. The Kansas statute there held to contravene the Fourteenth Amendment provided for the compulsory arbitration of disputes between employer and employee in industries declared by the legislature to be affected with a public interest. The appellants' business, which included principally the preparation of food for human consumption, was so classified. This Court held that the legislature's declaration was unreasonable and that there was

* See our main brief, pages 77 and 80.

no justification either upon principle or authority for classifying it as a business affected with a public interest. While some reference was made by the Court (p. 538) to the existence of competition as a reason against the existence of the power of regulation, nevertheless the applicability of the principles of that case is destroyed by the circumstance that in the case at bar we have (1) an element of consent to regulation, as shown by the various conferences and the participation of exhibitors in arbitration, and (2) the recognized need of arbitration in the motion picture industry. If it be argued that the consent is not complete, it is a sufficient answer that it was at least as complete as the consent in *Chicago Board of Trade* v. *United States,* 246 U. S. 231 (1918), discussed at pages 80 and 81 of our main brief, and that to the previously given consent must be superadded the endorsement of the Arbitration Plan in practice.

But the principal reason why the Government's authorities are inapplicable is that the adoption of the Contract and Rules assailed in the case at bar, when proper regard is had for the evils they were designed to remedy, had for its direct and necessary effect the lifting of a burden from interstate commerce and the freeing of interstate commerce from a restraint which had theretofore checked its free flow. Judge THACHER practically admitted as much when he said (R., pp. 168-169): "That competition between the distributors has been promoted by the adoption of the Standard Exhibition Contract, and that in many ways general trade conditions have been vastly improved, I have no doubt, and so find." *

We do not agree with the Government's suggestion (brief, p. 26) that the general arguments made in our

* In the instant case as in the *Credit Case,* the so-called restraint has had for its effect the avoidance of "serious interruption of interstate trade, inherent in the old abuses" (Opinion, *Credit Case* Record, p. 70).

main brief as to the conformity of the Contract and Rules with a growing public policy in favor of standardization and arbitration are irrelevant. On the contrary, in the language of YOUNGER, L. J., in *Attwood* v. *Lamont*, [1920] 3 K. B. 571, 581, a case involving the legality of a contract in restraint of trade,

> "* * * we are here dealing with a branch of the law which has at all times been peculiarly susceptible to influence from current views of public policy."

POINT VI.

In a number of particulars the Government brief ignores the history of the negotiations.

1. On page 9 the Government says "that the distributors forced these arbitration provisions upon the exhibitors." This ignores the testimony of Mr. Hess that the exhibitors themselves suggested arbitration as a substitute for the practice of requiring a deposit to be put up at the time of the making of each contract. (See in this connection R., p. 205 and our main brief, pp. 23, 30, 56 and 75.)

In other words, since the advance deposit system was abandoned largely upon the faith of the exhibitors' agreement to arbitrate disputes, a distributor who exacts a deposit from an exhibitor in default upon an award, is doing nothing more than restoring, as to that exhibitor, the *status quo ante*. Hence the deposit is not a new and oppressive levy, but is a return to the old method of doing business necessitated by the exhibitors' reversion to the practices which were responsible for that method.

2. The quotation (Government brief, pp. 51-52) of the exhibitors' resolution in a form in which it was neither seconded nor put to a vote, may conceivably give this Court an incomplete picture of what actually occurred. The substitute resolution was only put to a vote after the following colloquy had occurred (R., p. 1841):

> "The Commissioner: * * * Is there any objection to the substitute, Mr. Woodhull?
> "Mr. Woodhull: We accept the substitution."

See also R., p. 1844.

Before the vote was taken there occurred some discussion as to whether it was proper to put the substitute resolution to a vote at that session of the conference, or at the evening session. Eventually certain objections at first interposed were withdrawn, and the Commissioner caused a vote to be taken on the substitute resolution, with the following result (R., p. 1850):

> "The Commission[er]: I will call for a standing vote on the substitute resolution as amended in the conference. All in favor will arise. (Be seated.) Opposed stand up.
> "Receive resolution of the conference with one opposing vote."

3. The Government also says (p. 10) that the parties to the Standard Exhibition Contract agree "to submit any controversy under the contract to a board of arbitration." In so far as this implies an agreement not to go to court at all, it is an inadequate statement, for the requirement is only that a submission to arbitration *precede* the resort to the courts (R., p. 71).

4. The Government maintains (brief, p. 15) that the demand for security which may be made of an exhibitor

in default on an award "had no relation to any credit risk". And see page 32, where the same idea is repeated. In this connection, we beg to refer to our brief in the *Credit Case* (pp. 8, 35, 36 and 37) and to the necessity there demonstrated for giving to the word "credit" in this connection its full significance.

5. The Government (brief, p. 37) states that it was the custom of the secretaries to participate in the deliberations of the boards of arbitration. The authority cited is an address by Mr. Hess to the convention of the film boards of trade held at French Lick in 1927 (R., p. 1554). However, the presence of the secretaries at the deliberations of the boards of arbitration did not involve the casting of any vote by the secretaries; and Mr. Hess was emphasizing the advisability of appointing a seventh arbitrator where the Board could not agree, thus negativing the existence in the secretary of any power to break the tie. See in this connection the letter in the record concerning the practice of the Detroit Film Board of Trade (Gov't Ex. 11, R., p. 767).

The force of the Government's argument is further diminished by the fact that representatives of the exhibitors acted as secretaries of the board of arbitration in at least two instances. Thus, in Philadelphia, the secretary of the exhibitors' association in that territory was the secretary of the local arbitration board (R., p. 329); and in Detroit the secretary of the film board was secretary of the board of arbitration half the time and the secretary the other half was the manager of the exhibitors' association (R., p. 347).

Conclusion.

There seems to be no doubt as to the necessity of a speedy termination of disputes, a necessity arising out of the concatenation of rights in a particular film (main brief, p. 52); nor as to the vast improvement in the ethics of the industry, and the removal of the clog upon interstate commerce which grew to large proportions when contracts could be, and were, broken with impunity (*id.*, pp. 55-59). We submit that the Sherman Act should not be so construed as to compel the restoration of the very conditions of unfair trade and restraints upon the free flow of commerce which our anti-trust laws were specially designed to abolish. The "paradoxes of legal science" surely fall short of a consequence at once so opposed to reason and so calamitous.

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